No. 85-619

(3)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MERRELL DOW PHARMACEUTICALS, INC.,
Petitioner,

vs.

LARRY JAMES CHRISTOPHER THOMPSON AND DONNA LYNN THOMPSON AS NEXT FRIENDS AND GUARDIANS OF JESSICA ELIZABETH THOMPSON, LARRY JAMES CHRISTOPHER THOMPSON, INDIVIDUALLY AND DONNA LYNN THOMPSON INDIVIDUALLY, et al.,
Respondents.

On Writ of Certiorari to the United States Court Of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The district court recognized that the fourth cause of action in each of the respondents' complaints featured, as an indispensable element, alleged violations by petitioner of the Federal Food, Drug and Cosmetic Act. Because the fourth cause of action in each case "necessarily depends" upon the resolution of a substantial question of federal law, each such

cause of action (and each such lawsuit) is one "arising under" federal law and within the original jurisdiction of the district court.

Petitioner has never disputed that *other* causes of action contained in the respondents' complaints, including the non-federal negligence claims, were not dependent on any issue of federal law. However, this did not deprive the district court of jurisdiction, since it was bound to analyze the respondents' causes of action *separately* to determine whether a federal issue was a necessary element of *any* of them. This is the fashion in which this Court in *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) analyzed the two causes of action in that suit to determine whether *either* was necessarily dependent on a federal issue for the plaintiffs' recovery.

Respondents have not addressed the arguments set forth in the petition and thus tacitly concede that federal jurisdiction does not require that all of their causes of action involve an indispensable federal issue. Now, for the first time, respondents argue that even their fourth causes of action were not dependent on the Federal Food, Drug and Cosmetic Act violations which they alleged. Though respondents never so positioned themselves before, respondents now allege that petitioner violated the Ohio Pure Food and Drug Act and that this provides an alternate ground (based purely on state law) for possible recovery under the fourth causes of action. Because respondents have raised this new issue, petitioner is filing this reply brief.

ARGUMENT

POINT I

THE OHIO PURE FOOD AND DRUG ACT WAS NOT RAISED BELOW AND, IN ANY EVENT, HAS NO APPLICATION TO DRUGS MANUFACTURED, DISTRIBUTED, AND PRESCRIBED IN FOREIGN COUNTRIES, INGESTED BY FOREIGN CITIZENS, AND REGULATED BY FOREIGN GOVERNMENTS.

A. Respondents Failed to Raise Application Of The Ohio Pure Food And Drug Act In The Courts Below.

Respondents state that their respective fourth causes of action allege not only violation of the Federal Food, Drug and Cosmetic Act, "but also the Ohio Pure Food and Drug Law as well." Respondents' brief at 10. The Ohio Pure Food and Drug Act, Ohio Rev. Code Ann. §§ 3715.01, *et seq.* (Page 1980), has nothing to do with their claims. Whether the Federal Food, Drug and Cosmetic Act pertains is the issue raised in their respective fourth causes of action.

Respondents' complaints do not include allegations of violations of the Ohio Pure Food and Drug Act. Petition at 16a-17a and 26a-27a. Respondents' complaints do not even mention Ohio law. *Id.* It was not until respondents' motion to remand that any mention was made of Ohio law, *i.e.*, the alleged effect under Ohio law of the claimed federal law violations. Respondents' brief at 4a. "Under Ohio law, violation of a safety statute is negligence *per se*, rendering the actor liable to plaintiff if his negligence caused or contributed to causing the plaintiff's injury. Plaintiffs will amend their complaint to include this allegation." *Id.* This amendment was never attempted.

Regardless of the assertion set forth by respondents in their motion to remand, the district court was limited in its determination of the existence of jurisdiction upon removal to the allegations contained in the complaints. The indication that a

suit is one arising under the laws of the United States must be found exlcusively in a plaintiff's statement of his own cause of action, unaided by anticipated defenses to those allegations contained in the complaint. *Louisville and Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149 (1908); *Taylor* v. *Anderson*, 234 U.S. 74 (1914); *Smith* v. *Kansas City Title Co.*, 225 U.S. 180 (1921). This concept, known as the well-pleaded complaint rule, was reiterated in *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

A federal court must determine whether the true nature of the claim is federal, regardless of a plaintiff's characterization. *Federated Department Stores* v. *Moitie*, 452 U.S. 394, 397 n.2 (1981). Respondents alleged in their fourth causes of action that petitioner violated the Federal Food, Drug and Cosmetic Act and that each respondent family was entitled to $20,000,000.00 (Twenty Million Dollars) therefor. Petition at 18a and 27a. The district court was correct in holding that under the well-pleaded complaint rule, respondents "right to relief depends upon the . . . application of the . . . laws of the United States." Petition at 7a. The appellate court erred in ignoring the indispensable federal element of each respondent's fourth cause of action.

B. Even If The Ohio Law Would Have Been Raised, It Would Not Have Applied To These Cases.

As noted in the petition, any products ingested by respondents were not those of petitioner but were products manufactured and sold by foreign corporations outside the United States. Petition at 3. Respondents attempt, both in their complaints (petition at 13a and 23a), and in their brief, to disguise the true identity of the products which they allegedly ingested.

Mrs. MacTavish (if she took any drug) took "Debendox," a drug made and sold by British corporations in the United Kingdom. Respondents' brief at 3a. Mrs. Thompson (if she took any drug) took a drug made and sold by Canadian corporations in Canada. Debendox and Canadian Bendectin are

made, sold and prescribed under the regulations of the governments of these two foreign countries. Neither of the respondent mothers took a drug manufactured or sold by petitioner in the United States.

Thus, Ohio law would not apply to these actions. Ohio conflict of law principles dictate that the laws of the United Kingdom and Canada will eventually be applied to these claims. Ohio has adopted the conflicts theory stated in 1 Restatement of the Law 2d, Conflicts of Laws (1971), *i.e.*, a presumption that the law of the place of injury controls unless another jurisdiction has more significant relationship to the lawsuit. *Morgan* v. *Biro Manufacturing Co.*, 15 Ohio St. 3d 339, 474 N.E.2d 286 (1984). The alleged injuries in these cases occurred in the United Kingdom and Canada, where the drugs were manufactured, sold, preseribed and allegedly ingested and where the chiidren were born. Obviously, the United Kingdom and Canada have a more significant relationship to the lawsuit than does the state of Ohio and thus an Ohio court would apply those countries' laws. *See In re Richardson-Merrell, Inc.*, 545 F. Supp. 1130 (S.D. Ohio) *aff'd. sub nom, Dowling* v. *Richardson-Merrell Inc.*, 727 F.2d 608 (6th Cir. 1984); *Richard D. Chambers* v. *Merrell Dow Pharmaceuticals Inc.*, Case Nos. A-84-7926, et al. (Ct. Comm. Pleas Hamilton Co., Ohio Nov. 13, 1985) (both holding that in claims of United Kingdom Debendox plaintiffs, United Kingdom law would apply); *Vandervliet* v. *Richardson-Merrell, Inc.*, Case No. C-1-82-470 (S.D. Ohio Apr. 13, 1984) (holding that in claims of Canadian Bendectin plaintiffs, Canadian law would apply).

Moreover, the Ohio Pure Food and Drug Act, Ohio Rev. Code Ann. §§ 3715.01 *et seq.* (Page 1980), would not apply to the drugs ingested by respondents in Scotland and Canada. The Ohio statute applies only to drugs for which a new drug application has become effective under its provisions or the provisions of the Federal Food, Drug and Cosmetic Act. Ohio Rev. Code Ann. § 3715.65 (Page 1980). Although it is petitioner's position that the Federal Food, Drug and Cosmetic

Act would likewise not apply to foreign-made drugs, respondents *alleged* that this statute applies, thus creating the federal question giving rise to federal jurisdiction.

POINT II

FEDERAL QUESTION JURISDICTION EXISTS BECAUSE RESPONDENTS ALLEGED, *INTER ALIA*, A RIGHT OF ACTION UNDER THE FEDERAL FOOD, DRUG AND COSMETIC ACT.

Respondents devote most of their brief to argument and citation that no private right of action, created by the Federal Food, Drug and Cosmetic Act or implied thereunder, exists in these cases and therefore, no federal question jurisdiction is present. Respondents have missed the entire thrust of petitioner's argument. Whether or not the alleged violations of the Federal Food, Drug and Cosmetic Act afford respondents a right to relief is not the pertinent issue before this Court, nor was it the petinent issue before the courts below.

Petitioner agrees that no private right of action exists under the Federal Food, Drug and Cosmetic Act. However, the issue presented to the district court in these cases was whether respondents *alleged*, in their complaints, that they were entitled to relief for violation of that federal statute. In each fourth cause of action, respondents alleged "[t]hat the defendants' violation of said Federal Statutes directly and proximately caused the injuries suffered by said Minor. . . ." Petition at 18a and 27a. Respondents also alleged that this violation gave rise to a rebuttable presumption of negligence. *Id.* Thus, they alleged that the violation (1) gave rise to a private right of action and (2) gave rise to a rebuttable presumption. The courts below did not consider the first of these two issues. A determination of the private right of action issue was, and is, not necessary to resolve the questions before this Court.

Respondents are confusing the question of whether a court has jurisdiction, with the question whether the allegations state claims for relief upon which relief can be granted.

> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. *For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.* Whether a complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Fogel v. *Chestnutt*, 668 F.2d 100, 105 (2d Cir.) *cert. denied*, 459 U.S. 828 (1981) (emphasis added). *See also Mt. Healthy City Bd. of Education* v. *Doyle*, 429 U.S. 273 (1976).

The district court would have been obliged, had the cases not been dismissed on *forum non conveniens* grounds, to construe, or interpret the statute so as to determine respondents' right to relief. Respondents' respective fourth causes of action alleged the Federal Food, Drug and Cosmetic Act violations, and necessarily depended upon a resolution of disputed questions about that federal statute. The district court had jurisdiction because, under *Franchise*, respondents' claims arose under federal law whether or not a right to relief exists.

CONCLUSION

For the reasons stated in this reply brief and in the petition, the judgment of the appellate court should be reversed and the case should be remanded to the United States Court of Appeals for the Sixth Circuit with directions to affirm the judgment appealed from. In the alternative, this Court should grant certiorari to review the decision of the appellate court after further briefing by the parties.

Dated: November 20, 1985.

Respectfully submitted,

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